Supreme Court, U. S.
FILED
DEC 20 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-569

EDDIE LEE WEATHERSBY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Response in Opposition to Petition for Writ of Certiorari

GEORGE DEUKMEJIAN
Attorney General of the State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—
Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
GLORIA DEHART
Deputy Attorney General
KRISTOFER JORSTAD
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-0132
Attorneys for Respondent

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement of the case	2
1. The crime	2
2. Proceedings on selection of a jury	4
Reason for denying the writ	7
The prosecutor did not use peremptory challenges to exclude black persons from the Petit jury solely on the basis of race, without regard to legitimate trial-related objectives	7
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases

People v. Wheeler 22 Cal.3d 258 (1978)	8, 9
Swain v. Alabama 380 U.S. 202 (1964)	8, 9
Taylor v. Louisiana 419 U.S. 522 (1975)	8, 9

Constitutions

United States Constitution:	
Sixth Amendment	7, 8
Fourteenth Amendment	8

Statute

Title 28, United States Code, section 1257(3)	1

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-569

EDDIE LEE WEATHERSBY,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Response in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

Petitioner seeks review of a judgment affirming his conviction for first-degree murder entered by the California Court of Appeal, First Appellate District, Division Four on June 6, 1979. Pursuant to California Rules of Court, Rule 976, the opinion was neither officially reported nor published, but is set forth in full as Appendix A to the petition. On August 3, 1979, the California Supreme Court denied the petition for hearing.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3).

QUESTION PRESENTED

Whether the prosecutor used peremptory challenges to exclude black persons from the petit jury solely on the basis of race, without regard to legitimate trial-related objectives.

STATEMENT OF THE CASE

By indictment filed May 12, 1976, the Alameda County Grand Jury accused petitioner and codefendants Allen Ray Tucker, Stephen Douglas Browning and Enrique Eugene Wyatt of the murder of Lester Nelson (CT 1-5). Petitioner pleaded not guilty (CT 43-46). On March 24, 1977, after a two-month trial by jury, petitioner was found guilty of first-degree murder (CT 178, 182-184).

1. The Crime.

On the afternoon of April 26, 1976, Lester Nelson was returned to the Alameda County Jail at Santa Rita, California following a court appearance. Shortly after he entered one of the barracks, he was stabbed and bludgeoned to death by a group of inmates including petitioner Weathersby and his codefendants Tucker and Browning. The prosecution demonstrated that the motive for Nelson's killing was revenge for a murder Nelson himself had supposedly committed (RT[1] 454, 512-514).

As Nelson walked into the barracks he was confronted by petitioner near the shower. Suddenly codefendant Tucker pushed against Nelson from the opposite side, trapping Nelson as he attempted to flee. Codefendant Browning blocked the escape while petitioner and Tucker

[1]"RT" refers to the reporter's transcript of the trial. "JRT" refers to the reporter's transcript of the proceedings in selecting a jury.

took out a knife and a sharpened wire and stabbed Nelson dozens of times in the head, chest, back and arms (RT 583-584, 650-652, 949-951, 1114-1117, 1377-1379). Browning supervised the assault, ordering the stabbing to continue as long as Nelson kept breathing (RT 1379). Finally, Browning grabbed Nelson by the legs and dragged him into the shower room, where he was beaten savagely about the head with a mop wringer, causing fractures of his facial bones, teeth, hard palate, and skull (RT 582-586, 594-597, 653-656, 862, 951-953, 1119-1120, 1380).

Petitioner's allegations that this was a close case based on weak evidence, and that the jury had difficulty reaching a verdict are not true. As the Court of Appeal noted, "the assertions that 'this was a very close case' and that the evidence was 'weak and suspect' are truly remarkable." (Pet., App. A, p. 11). The evidence of guilt was utterly overwhelming and the "minutes of the court proceedings show that the jury had no difficulty in rendering a unanimous guilty verdict" against petitioner Weathersby (Id. at p. 8).

Similarly, petitioner's innuendo that the prosecutor made inflammatory appeals "to the racial fears and prejudices of the all-white jury" (Pet., p. 5) and attempted to raise "the spectre of racial and terrorist violence, prison gang executions, and several of the most notorious persons and events to have entered public consciousness in the last decade" (Pet., p. 7) is patently false. These allegations of misconduct were expressly rejected by the Court of Appeal (Pet., App. A, p. 12). The record shows that the *defense* introduced the "inflammatory" material in

allusions to the Black Guerrilla Family (e.g., RT 1134, 1531-1550, 1598-1563), Donald ("Cinque") DeFreeze (RT 2639), George Jackson (RT 2375), and the Black Muslim sect (RT 2235). On the single occasion when the prosecutor, cross-examining a defense witness, alluded to the "Zebra" killings, a relevancy objection was sustained and the question ordered stricken (RT 2282, 2314). Petitioner's insinuation that the prosecutor deliberately sought to rely on such extraneous and highly prejudicial material to bolster an otherwise frail case is thus untrue.

2. Proceedings on Selection of a Jury.

Petitioner also distorts the record in his account of the jury voir dire. The first time that the defense alleged that the prosecutor had "systematically excluded" black jurors by use of peremptory challenges, the court responded by reviewing the statistics of the use of challenges. Noting that the prosecutor had used 23 peremptory challenges up to that point and that only half of those had been used to excuse blacks, the court found that "I have no basis upon which to find systematic exclusion of black jurors." (JRT 474).

During the selection of alternate jurors the defense renewed its claim that the prosecutor was using his peremptory challenges to systematically exclude blacks from the jury. According to the defense tally, of the total of 134 potential jurors that had been summoned, 19 were black. Three of these 19 had been excused by the court for cause, and the prosecutor had used 16 of his total of 34 peremptory challenges to excuse the rest (JRT 832-833). As if to confirm the prosecutor's invidious intention in his use of

peremptory challenges, petitioner states that the prosecutor winked at the defendants several times after he had excused black persons. (Pet. pp. 5-6). The full record establishes that what actually took place had nothing to do with the deputy district attorney's use of challenges. When he was asked to reply to the charge of provoking the defendants he said:

> "It is true, Your Honor, [defense counsel] is quite correct, I did wink at Mr. Browning, but only as a response to a statement made by him under his breath. By reading his lips, he looked at me and called me a fucking pig. I want that on the record." (JST 837).

It is thus deceptive to imply that the "winking" episode somehow establishes the prosecutor's racial bias.

It is also misleading to state that in presenting his reasons for exercising peremptory challenges the prosecutor made "a clear admission of systematic exclusion based on group bias." (Pet., p. 6). In response to the final motion for mistrial on the grounds of improper use of challenges, the prosecutor rebutted the accusation by setting forth several of the reasons why he had excuse blacks:

> "MR. ANDERSON [the prosecutor]: Your Honor, I just want to point out this is about the fourth or fifth time that they have made a motion for mistrial on grounds of systematic exclusion of the jury, and they have indicated that some 16 blacks have been excused by the prosecution in this case. I want to point out for the record that one, possibly two of them were represented by [a defense attorney's] law firm, . . . Another black potential juror indicated she knew the defendant Ray Tucker's wife. Other ones I felt gave evasive answers to some pretty basic questions out

there, and whether it can be perceived by others, as His Honor knows, having been a great trial attorney in the past, it takes a gut reaction as to somebody you feel is giving an evasive or untruthful answers to the questions posed.

Due to those circumstances in this case, and the nature of the Black Guerrilla Family, I feel also that *some* black jurors would be subject to some intimidation by the group, which His Honor has indicated by a pre-trial ruling that the prosecution may bring up via opening statement and evidence to be introduced at the trial . . .

Due to all those considerations, the fact that *some* jurors *might* be subject to intimidation by the BGF, and that the BGF has parolees on the streets of Alameda County right now, and the fact that some of them are represented by [a defense attorney's] law firm and some knew defendant Ray Tucker's wife, I fail to see how they can make the allegation that I am systematically excluding blacks from this particular panel." (Emphasis added.) (JRT 897-898).

These remarks establish that there were several obvious affirmative reasons for the prosecutor's use of peremptory challenges, all of them deriving from legitimate trial-related considerations and wholly unrelated to race. The valid apprehension that *some* black juror *might* be subjected to intimidation by the Black Guerrilla Family shows a realistic and solicitous regard for the welfare of potential jurors and a determination to obtain an impartial jury, not generalized racial bias. In short, the impression petitioner seeks to convey of systematic exclusion solely on the basis of race is completely refuted by the record.

Finally, we note that the prosecutor did not exercise one of the peremptory challenges he still had against the seating of a black alternate juror (JRT 884-885). Given the length and difficulty of this trial, there was a clear possibility that alternate jurors would be called upon to serve.

REASON FOR DENYING THE WRIT

The Prosecutor Did Not use Peremptory Challenges to Exclude Black Persons From the Petit Jury Solely on the Basis of Race, Without Regard to Legitimate Trial-Related Objectives.

Petitioner claims a denial of his Sixth Amendment right to an impartial jury of his peers because of the prosecutor's use of peremptory challenges to exclude black jurors from his petit jury. As we have shown above, however, the record in this case discloses that the prosecutor did not challenge potential black jurors because they were black. When his motives had been repeatedly impugned, he gave a clear statement of his reasons for challenging particular black jurors, reasons not based on racial prejudice. The prosecutor noted that two of the black jurors had been represented by counsel for a codefendant, and that another knew a codefendant's wife. He disclosed that an unspecified number gave what he perceived to be evasive or untruthful answers to his questions on voir dire. Finally, he mentioned that given the circumstances of the case and the nature of the Black Guerrilla Family, he feared that an unspecified number of potential black jurors might be vulnerable to intimidation. We submit that petitioner's entire argument falters at the outset. The alleged "purposeful and systematic exclusion" of black jurors solely on the basis of race simply did not happen in this case.

Petitioner invites this Court to adopt the rule announced by the California Supreme Court in *People v. Wheeler* 22 Cal.3d 258 (1978) that peremptory challenges are no longer "peremptory" when an opponent objects that they are being used solely on the grounds of "group bias." Upon such objection, the California Constitution now requires a justification, excuse, or explanation of the "peremptory" challenge. *Id.* at 280. California has thus enacted the "radical change in the nature and operation of the challenge" which this Court has declined to do since *Swain v. Alabama* 380 U.S. 202, 222-223 (1964).

Petitioner cites a group of cases decided by this Court since *Swain* which, he maintains, have "eroded" the *Swain* holding concerning the use of peremptory challenges in a single case. Every one of these cases is inapposite since they all deal with the composition of grand juries or jury venires, not petit juries. Petitioner's entire argument is an effort to eliminate the established distinction between the jury venire and the petit jury. In *Taylor v. Louisiana* 419 U.S. 522 (1975), one of the petitioner's principal cases, this Court held that the presence of a fair cross section of the community on the panels from which petit juries are drawn is essential to the fulfillment of the Sixth and Fourteenth Amendment guarantee of trial by an impartial jury. But *Taylor* also expressly rejected the proposition that the ultimate petit jury be subject to the same cross section requirement.

> "It should be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, [citations omitted]; but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at p. 538.

As Justice Richardson argued in his dissent in *Wheeler*, this is

> "the only feasible rule, given the element of chance which necessarily, and properly, is injected in the process through use of the jury wheel. For although the jury panel sitting in the courtroom may reflect to perfection the economic, social, occupational, sexual, religious and cultural community from which it is drawn, once the jury wheel is turned and the first names are drawn the situation is changed. Fate takes a hand. The first 12 names drawn may be all men, or all women, all black or all white, all from the poor, or from the wealthy class. The exercise of the peremptory challenge by both sides is directed to 12 persons who may not be, at any given time, 'representative' of either the community or the venire. It is not the true function of peremptories to 'restore' any balance, but rather, to the extent humanly possible to attain impartiality. Thus the true rule and goal should be that while the jury venire, or pool, or reservoir must be 'representative' the trial jurors must be 'impartial.' " *Wheeler, supra*, 22 Cal.3d at 291

Petitioner simply fails to address this vital distinction, defined by this Court in *Swain* and not since questioned except in California. For this reason above, quite apart from

his selective and distorted presentation of the record, his claims should be rejected.

CONCLUSION

For the stated reasons, the People of the State of California respectfully urge this Court to deny the petition for a writ of certiorari.

DATED: December 14, 1979

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—
Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
GLORIA DEHART
Deputy Attorney General
KRISTOFER JORSTAD
Deputy Attorney General
Attorneys for Respondent